No. 837

IN THE

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

JESSE M. SMITH, EPHRAIM P. ELLISON, ELIAS ADAMS, JOHN W. THORNLEY, JAMES W. CHIPMAN, JAMES LOVE, ANTHON J. NEILSON, BENJAMIN R. MEEK, PETER A. NEILSON, JOSEPH S. NEILSON, HEBER A. SMITH, HANS S. NEILSON, ANDREW ALLEN, ELLSWORTH ALLEN, RILEY ALLEN, ISAAC DUNYON, AURELIUS FITZGERALD, HENRY CHIPMAN, BENJAMIN DANSIE, THOMAS MERCER, WILLIAM AYLETT, HEBER AYLETT, JOHN A. EGBERT, GEORGE DANSIE, FRANK DANSIE, WILLIAM CRANE, I. J. FREEMAN, JOSEPH R. OLSEN, L. PARKER.

Appellants,

vs.

THOMAS G. LOWE, JOHN R. THOMAS, DAVID W. JONES, D. H. ANDERSON, JOHN DOE, and RICHARD ROE, Whose Other or True Names are Unknown,

Appellees.

APPELLANTS' BRIEF.

Upon Appeal from the United States Circuit Court for the District of Idaho.

JAMES H. MOYLE,
BROWN & HENDERSON,
LINDSAY R. ROGERS,
Attorneys for Appellants.

DAILY REPORTER PRESS, SALT LAKE.

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Appellees.

THE FACTS.

The issue in this case is, as to whether or not the State of Idaho can, under the pretense of a quarantine law, completely exclude the sheep of non-residents of the State

from grazing sheep on the unoccupied unclaimed lands of the Federal Government, herein referred to as the Public Domain, in that State; or in other words, can the live stock growers of the State of Idaho. with the aid of willing State Officials, secure for themselves a monopoly of the grass growing upon the public domain of the general government in that State.

The lower court held that the complaint of the plaintiffs and appellants did not state a cause of action, because the acts complained of were performed under and in pursuance of the sheep quarantine laws of the State of Idaho. (Trans. p p. 24-30.)

The only question argued or considered or decided in the lower court, was whether the complaint stated a cause of action; and we will therefore, not presume to burden the court with an unnecessary discussion of any other question at this time.

The complaint contains the facts. It alleges that the appellants are citizens of the State of Utah, and that the defendants are citizens of the State of Idaho. That the appellants are the owners of 72,500 head of sheep of the value of $350,000.00, which sheep they had theretofore for years grazed during the Spring, Summer and Fall of the year in the States of Idaho and Wyoming upon their own land, and upon the public domain or lands of the general government; and that in the winter time and the early spring, they ranged these sheep on the Desert in Utah and Nevada, but chiefly in the County of Box Elder, in the State of Utah, which County constitutes the greater part of the Northern boundary of the State of Utah. The prohib-

ited Counties of Utah constitute the entire North boundary of Utah and South boundary of the State of Idaho. That at the time the action was filed, March 21st, 1901, these sheep were in said Box Elder County near the Idaho line, and on the border of said Desert and were endeavoring to pass over said line into the State of Idaho for the purpose of obtaining pasturage on the said public domain and upon the land of their owners in the State of Idaho and Wyoming. (Trans. pp. 3 and 4.)

That the sheep are wholly dependent upon the Winter snows for water while on said Desert, and in said County, where they were at the time said action was brought. That if said sheep were detained where they then were, or prevented from passing on to their said Spring and Summer range in the States of Idaho and Wyoming, they would be destroyed, and would die for the want of water and feed neither of which could be obtained where they were then, or where they had come from on said Desert, so that there was no opportunity for retreat. (Trans. pp 2-10.)

The court will also take judicial notice of the fact that millions of sheep are grazed on said Desert in the Winter and are compelled to leave the same as soon as the snow has melted and enter the valleys and mountains on the North and East of said Desert during the time included within the proclamation herein referred to. That said Box Elder County is practically the sole gateway for sheep wintered on the Desert and summered in Idaho and Wyoming, and the time stated in said proclamation the only time such sheep can or will attempt to pass through

this gateway. Hence the proclamation while limited to forty days is just as effectual against transfering these sheep and other sheep so wintered from passing from said winter range to the Spring and Summer range as if it covered the entire year, for the reason that said sheep would all be dead at the expiration of the forty days, if they were not transferred from their winter range during that time. (Trans pp. 4-5-10.) That if said sheep could by any practical means be transferred to any other available range than that included in the State of Idaho, which is the only range within the reach of these sheep and which is open to them, it would after the expiration of said forty days be wholly impractical and at an irreparable loss to transfer said sheep to their usual range in the State of Idaho. It will also be understood that sheep grazed on the Desert in Utah and Nevada are so grazing upon the public domain and are cared for in herds of from two to three thousand, which sheep in the Spring are driven into the valleys and mountains where grass and water can be found in the Spring and Summer, chiefly upon the public domain; and that these sheep have certain seasons for lambing, and can only be lambed at certain places, and if large numbers of these sheep were attempted to be transferred to new ranges, all of which are occupied by other sheep, it would result in their being so crowded that general destruction would result therefrom. It is also a well known fact that the only outlet from the range on the Northern end of the Desert in Northern Utah and Nevada, is through Box Elder County and Idaho to Wyoming. (Trans. pp. 2, 3, 4, 10 and 11.)

That the appellants were and had been endeavoring to drive their sheep over the said public domain from the State of Utah into the State of Idaho on their way to the States of Idaho and Wyoming, but were prevented from so doing by the defendants. (Trans. p. 6.)

That about one-third of these sheep were also on their way to the eastern market in the States of Nebraska, Missouri and Illinois. That it was necessary for them to have feed which according to the customary way of raising sheep in that locality could only be obtained profitably by grazing on the public domain. That if they were not prevented by the defendants, they would so transport their sheep from the State of Utah through the States of Idaho and Wyoming to the said markets, and that the balance of said sheep would lamb in the States of Idaho and Wyoming and be grazed therein during the summer, and without said privilege appellants would be irreparably damaged. (Trans. pp. 3, 4, 5, 6, 11, 12.)

The complaint further alleges that the Appellees and their confederates and their agents were so preventing the Appellants from driving their sheep into the State of Idaho in order to obtain for themselves and those associated with them the exclusive use of the said public range in the State of Idaho and the grass growing upon the lands of the government of the United States therein. (Trans. pp. 6 and 11.)

That if the appellants drive their sheep into the State of Idaho upon the said public domain, the Appellees threaten to, and unless restrained, will force said sheep back where they then were upon said desert, where there is

no feed or water, and in so doing will cause their ewe sheep, of which there are many, to prematurely lamb and die, to the damage of the appellants in the sum of $350,-900.00, (Trans. pp. 3, 4, 6, 10, 11, 12,) and that for so forcing said sheep back on to said Desert, said defendants threaten to, and unless restrained from so doing, will take the same with force and appropriate them to their own use and benefit, without any warrant or authority therefor and without due, or any process of law. (Trans. pp. 6, 7, 8, 9, 10, 11 12.)

That the said alleged authority of the defendants for their acts is contained in Exhibits "A" and "B," (Trans. pp. 15 and 18,) which exhibits consist of a legislative act of the State of Idaho against diseased sheep and a proclamation of the Governor of the State of Idaho.

That the facts alleged, and which are claimed to exist and which are referred to in said Proclamation as reasons for making said Proclamation are false, are groundless, and were given to said Governor, if he has received the same, for the sole purpose of inducing him to assist the Appellees, their associates and confederates in obtaining for themselves a monopoly of the grazing lands on the public domain of the United States. (Trans. 6, 9.)

That the said sheep of the appellants were free from scab and the districts referred to in said proclamation and through which said sheep had traveled and been grazed were free from scab and diease of all kinds. Trans. pp. 6, 8, 9 and 10.)

That the laws of the United States provide for the inspection and quarantine of such sheep passing from one

state to another, and for the suppression of the diseases referred to in said proclamation and law of the State of Idaho. That the Federal Government employs inspectors of sheep, who inspect sheep passing from one state to another, and determine whether such sheep are infected with disease, and particularly the disease known as scab or scabbie. That said inspectors had and were then inspecting said sheep, and that the appellants had caused said sheep to be so inspected in conformity with the laws of the United States; and that said inspection disclosed that both said sheep and the range upon which they then were and had been were free from disease, and particularly the disease of scab or scabbies. (Trans. pp. 8 and 9.)

That the said defendants are financially irresponsible. (Trans. p. 7.)

The question presented then is as to whether the action of the Governor of the State of Idaho in making said proclamation is final and conclusive, and cannot be questioned irrespective of the motive or purpose behind it, or the gross wrong which is attempted, or may be attempted to be accomplished through the executive department of the State, however unwise or vicious it may be.

ASSIGNMENT OF ERRORS.

1st. That the Court erred in sustaining the said demurrer interposed to the plaintiffs' said bill in equity.

2nd. That the Court erred in dismissing the plaintiffs' said bill and refusing to grant the plaintiffs the relief prayed for in said bill.

ARGUMENT.

The appellants insist that the quarantine law in question and the proclamation of the Governor of Idaho, as construed and applied and the acts of the appellees are in violation of the following provisions of the Constitution of the United States, to-wit:

1. That portion of Sec. 8, Art. 1, to-wit: "To regulate commerce among the several states."

2. Sec. 2, Art. 4: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

3. The following portion of Fourteenth Amendment to the Constitution: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

I.—REGULATION OF COMMERCE.

The most important question presented, and asked to be determined by the Appellants, is as to whether the Statute and Proclamation in question, as construed, and the action alleged to be exercised thereunder, is a just and lawful exercise of State power, or whether they are, as contended by Appellants, a mere subterfuge and roundabout means adopted to invade the domain of Federal Authority; and if it be such subterfuge, should or could

the lower court inquire into, and determine whether the Executive officers of the State were acting in reason and good faith, and not in violation of the Constitutional right of the Appellants.

The lower court seems to have acted upon the theory that it was without jurisdiction to inquire into the good faith of the State officers or the reasonableness of their action. That the court could not go behind the Statute of the State and the Governor's Proclamation. That they were final and conclusive, and beyond the reach of Federal or other judicial action. But while the lower court appears to follow the above view, it at the same time, admits that the grossest of wrongs may result therefrom and Inter-state commerce be unjustly interfered with and that the decisions of the Supreme Court of the United States have declared the law to be, "*that under the guise of either a proper quarantine or inspection law a regulation of Commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. It is the Character of the Circumstances which gives or takes from a law or regulation of quarantine a legal quality.*" (Trans. pp. 28, 29, 30.) Thus the trial court quotes the law correctly, but ignores it in entering judgment.

That the court has jurisdiction to inquire into the facts, and determine whether the quarantine law and regulations and action thereunder are unjust, or a mere pretense or masquerade under which to regulate commerce and defect the rights of the Appellants, we quote from and cite the following cases:

"In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power, or is intended by round-about means to invade the domain of Federal authority this court will look into the operation and effect of the statute to discern its purpose."

Compagnie Francaise vs. The State Board of Health, La.

No. 16, July 15th, 1902, page 812, Advanced Sheet of the U. S. Sup. Ct. Rep's. Law Ed.;

46 Law Ed. of the U. S. Rep. 816;

Smith vs. St. Louis & South-western R. Co., 181 U. S. 248, 257;

Henderson vs. New York, 92 U. S. 259, 265;

Hanibal, St. Joe R. R. Co. vs. Husen, 95 U. S. 465;

Chy Lung vs. Freeman 92 U. S. 275;

State vs. Duckworth (Idaho) 51, Pac. Rep. 456;

Canon vs. New Orleans 20 Wall. 577.

In Smith vs. St. Louis and South-western R. Co., 181 U. S. 257, the court said, *"What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained."* Such being the law it is difficult to understand why the trial court, in view of the

facts alleged, should have had any doubt about the sufficiency of Appellants' complaint.

It appears, however, from the written decision of the trial court (Trans. pp. 25, 26 and 27,) that before passing on the demurrer, a hearing was had and evidence taken on the application for a temporary injunction, and that at the hearing the court regarded the complaint as sufficient, and found that the sheep were not diseased, and that the forty days restriction was unnecessary, as two dippings of the sheep for scab about ten days apart was sufficient to completely destroy the disease and the parasite from which it arises. That the sheep should be permitted to pass into the State of Idaho, and that the Appellees should be restrained from interfering with the sheep, but that since the commencement of the action and said hearing, and prior to formerly passing on said demurrer, two decisions of the Supreme Court of the United States had been rendered, namely, (Rasmussen vs. Idaho 181 U. S. 198 and Smith vs. St. Louis and South-western R. Co., Id. 248), which decisions changed the opinion, or the action of the court. The lower court said, in rendering its decision, while "these decisions do not say that a Federal Court may not, in such cases, entertain jurisdiction for the purpose of determining the good faith both of the law and its enforcement, and while in the one case it is said that such a law cannot be made a mask to shield a violation of the inter-state commerce constitutional provision, *in both there is an intimation that when the law upon its face is one to prevent the spread of disease in the State, the State officers may be relied upon to, in good*

faith, enforce it in justice to all. At any rate, in the two cases above examined, the laws and their enforcement by the State officers were sustained, and such laws and such enforcement thereof were as strong in exclusion of foreign stock as is the law in the case under consideration. It must follow, therefore, that this law may be enforced by the State officers; that the complaint does not state a cause of action which this Court may take jurisdiction, and the demurrer thereto is sustained." (Trans. pp. 29, 30.) Thus the court was of the opinion that the law was against the Appellees, but said decisions protected them.

It thus appears that said decisions were controlling in the judgment of the trial court, and in effect determined that no matter what the wrong might be, so long as it masqueraded under the guise of a quarantine law of a State it cannot be investigated, or the action of State officers thereunder be defeated, because it is conclusively presumed and cannot be questioned, *that State officers may be relied upon to, in good faith, enforce quarantine regulations, no matter what they may be,* so long as they are declared by executive officers to be intended for the good of the State and the suppression of disease.

This conclusion is in direct opposition to every decision on the question, and no decision can be found to sustain any such a conclusion, but on the contrary the decisions above, including the decision to which the lower court referred, announces a contrary doctrine.

In the case of Rasmussen vs. Idaho 181 U. S. 198, the only question raised was whether the unconstitutionality of a law of Idaho was disclosed on its face, while it au-

thorized a similar proclamation. The question of good faith, or the unconstitutional application of the law, however, was not raised. It must be borne in mind, too, that the Supreme Court of the United States subsequently and at the same term said, in Smith vs. St. Louis & South-western R. Co. 181 U. S. 248, that "What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared" by this Court. That question had not been considered by that court.

And its last expression on that question is as follows: "It will be time enough to consider a case of such supposed abuse when it is presented for consideration."

Campagnie Francaise vs. State Board of Health 46 U. S. (L. Ed.) 817.

Such is also the law as construed in State of Idaho vs. Duckworth, 51 Pac. Rep. 456.

It is clear that this question was never presented to the Supreme Court, and unless it disregards all its former decisions, no violation of the Constitution will be permitted under the mere guise of a quarantine law.

In the case of Smith vs. St. Louis & S. W. R. Co., an entirely different condition exists There the States of Texas and Louisiana are involved, and it is a notorious fact that all live stock in parts of those States are subject to a disease which is common, and epidemic, especially in certain localities. That it then existed or was believed to exist in such a way as to require quarantine regulations, and of that fact the Court took judicial notice. But in that case the absence of the good faith of the law or proclamation or the officials or their action was not established, if

questioned The sole question involved was the constitutionality of the law itself, and the order of the Sanitary Commission providing for the quarantine, with no presumption of good faith rebutted. That such is the case, is clearly disclosed, for the Court said, "It is urged that it does not appear that the action of the live-stock Sanitary Commission was taken on sufficient information. It does appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances, or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstances would have to be shown to sustain the quarantine, as was said in Kimmish vs. Bell, 129 U. S. 217, 32 L. Ed. 695, 2 Inters. Com-Rep. 407, Sup. Ct. Rep. 277. It is for the Breach of this alleged duty he sues; yet it no where appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into. *So far as the record shows every animal of the kind prohibited in the State of Louisiana may have been actaully affected with charbon or anthrax;* and it is conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

From the foregoing it is apparent that no attempt even was made to prove that the alleged facts warranting the quarantine did not exist, or that the officers were not acting in good faith. How this case could have misled the lower court, as it seems to have done, is hard to understand. In State vs. Duckworth, just cited, the Court recognized the distinction we make when it said, page 458, "In other words, the sheep of our neighboring states are no more the natural habitat for scab, or other infectious diseases to which sheep are subject, than are Idaho sheep. *Those facts distinguish the case at bar from those cases in which the constitutionality of laws aiming to protect the cattle of certain states from the ravages of the disease commonly known as 'Texas fever' is involved. It is recognized that Texas cattle are the natural habitat for said disease, and if they are excluded from a state, as well as cattle that have come in contact with them, the disease is wholly prevented. It is thus shown that that class of cases is distinguishable from the case at bar.* The enactment of a similar statute to the one under consideration, by the states of Wyoming, Nebraska, Iowa and Illinois, would result in closing the market of Kansas City, Omaha and Chicago, to the sheep growers of our state."

In Grimes vs. Eddy (Mo) 28 S. W. Rep. 756, the court said it would "take judicial notice of the fact that Texas Cattle have some contagious or infectious disease communicable to native cattle."

The Appellants rely on the bad faith of the officers and the total absence of facts warranting any quarantine regulation. It is conceded in the absence of an answer to

the complaint that both the sheep in question and the prohibited range from which they came were free from disease, and even the lower court says that two dippings ten days apart is sufficient to exterminate the disease against which the quarantine was laid, namely, scab or scabbies. (Trans. pp. 8, 9, 10, 11.)

The Supreme Court of Idaho had also previously decided that two dippings for scab, ten days apart, is sufficient to destroy the disease. That it breaks out in sores within ten days after exposure, and two dippings cures it. That it is easy to discover the existence of the disease.

State vs. Duckworth, 51 Pac. Rep. 456, 458.

The Proclamation entirely excluding non-resident sheep lasted forty days, in spite of the fact that ten days quarantine was sufficient.

It is also likewise admitted that the Idaho quarantine regulation is solely intended for the purpose of unlawfully enabling the Appellees and their confederates to monopolize and exclusively use and graze their sheep on the grass growing on the unclaimed lands of the United States. (Trans. p. 6.)

If this be true, and it is not yet challenged, what could be a more unjustifiable and manifest violation of Constitutional rights, say nothing of official decency?

The quarantine regulation in question can scarcely be said to be a pretense or masquerade, it is practically on a par with the action of the bold highwayman. The lower court certainly overlooked, or did not take this undenied allegation seriously.

The important question then is, does the Appellants' Bill allege, that the Law or the Proclamation, or the Law and Proclamation as construed and applied, disclose a "just exercise of State power, or is it a mere pretense and round-about means of invading the domain of Federal authority?"

It must be conceded that the latter conditions exist if the allegations of the complaint are true, and as they are not denied, they cannot be controverted in this court.

While the line between such a constitutional and unconstitutional inter-state quarantine has not been expressly and technically determined, the Supreme Court of the United States and some of the State Courts have, in a variety of cases, declared less offensive and exclusive quarantine regulations unconstitutional.

We maintain the law to be that a quarantine or police regulation, which prohibites or unnecessarily restricts the transportation of live stock into a state, except where the same is in fact a necessary quarantine regulation, is an unconstitutional interference with inter-state commerce, and such is the case, however much it masquerades under the mere guise or false pretense of a necessary quarantine regulation.

Hanibal & St. J R. Co. vs. Husen, 95 U. S. 465, 24 L. Ed. 527.

State vs. the Constitution 42 Cal. 578.

Bangor vs. Smith 83 Me. 422; 13 L. R. A. 686, 22 Atl. 379.

The *Husen* case is recognized as the leading case on the subject. It has never been criticised or reversed, but

has been followed and cited in a long line of cases, for a list of which see 9 Roses Notes of U. S. Reps. 287 to 293.

If the regulation does in fact unnecessarily interfere with commerce, or is a quarantine regulation only in name, and is intended in fact to exclude or interfere with interstate commerce, or to secure an undue advantage in favor of one class of citizens as against another, even though it is declared by state officers to be a necessary quarantine regulation, its true purpose and effect will be discovered by judicial inquiry, and if unlawful, defeated.

Henderson vs. New York 92 U. S. 259.

State vs. Duckworth (Idaho) 51, Pac. Rep. 456.

Chy Lung vs. Freeman 92 U. S. 275.

Hanibal St. J. R R. Co. vs. Husen 95 U. S. 465.

In State vs. Duckworth, just cited, the Supreme Court of Idaho held a less objectionable law unconstitutional, and said:

"Under the guise of inspection and quarantine, said sections place unnecessary burdens and restrictions upon bringing sheep into this state for any purpose whatever, or transporting them through the state to the markets of the East, and make unnecessary and prejudicial discriminations against sheep whose owners may desire to bring them into the state; and they are repugnant to the provisions of the federal constitution. Said sections are void for that reason."

We have previously shown that the Idaho quarantine regulations, while only lasting forty days, were just as ex-

clusive as if they had lasted for twelve months. (Trans. pp. 3, 4, 5, 6, 8, 9, 10.) In this connection we call special attention to the following sentence contained on page 10 of the Transcript, to-wit:

"That sheep are transported from said alleged infected and prohibited districts only during the said prohibited season, and through the said prohibited counties of Utah."

While some cases hold that a state can enforce reasonable quarantine and inspection laws, necessary for the protection of the property of its citizens, even though it may to some extent interfere with inter-state commerce, no court has held that it can prevent the transportation of live-stock, or other subjects of commerce beyond that which is actually and in fact necessary for its self protection.

Hanibal & St. J. R. Co. vs. Husen 95 U. S. 465.

Brimmer vs. Rebman, 138 U. S. 78.

Scott vs. Donald, 165 U. S. 58, and cases cited therein.

Grimes vs. Eddy, 26 L. R. A. 638.

Bowman vs. Chicago & N. W. R. Co. 125 U. S. 488.

In Hanibal & St. J. R. Co. vs. Husen, 95 U. S. 465, 471, 473, a Missouri statute, was held unconstitutional. It provided that no Texas, Mexican or Indian cattle, not kept the entire previous winter in the State of Missouri,, should be driven or otherwise conveyed into or remain in any county of that state between the first day of March and the

first day of November in each year. In that case the court admitted, however, that a statute would be constitutional, which excluded property dangerous to property of citizens of the state, such, for an example, as animals having contagious or infectious diseases. The decision was placed on the ground, that while contagious or infectious animals could be excluded, the state could not, under the claim of exercising its police power, substantially prohibit foreign or inter-state commerce. The Missouri statute was also held unconstitutional because it went beyond the necessities of the case, it having been drawn so as to practically exclude Texas, Mexican or Indian cattle from the state, whether free from disease or not, or whether they would or not injure the inhabitants of the state. In that case it was also claimed in behalf of the Missouri law, that it was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the court pointed out that no provision was made for the actual inspection of the cattle so as to secure the rejection of those only that were diseased. The court held that the statute was void as a plain intrusion upon the exclusive domain of Congress. Both the letter of the decision and the reason upon which it was based applies equally to the Idaho law. The decision referred to has been quoted and referred to approvingly in a great number of cases since, and in no case has it been overruled or criticised.

In Bowman vs. Chicago R. Co., 125 U. S. 488, the court held a state law prohibiting the importation of liquor without a certificate that the consignee was a licensed dealer.

was not an inspection law, but a regulation of commerce and unconstitutional.

A burden or restriction imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all states, including the people of the state enacting such statute.

Scott vs. Donald 165 U. S. 98 and cases therein cited.

EQUAL PRIVILEGES DENIED.

The Proclamation, while excluding absolutely the driving of sheep into the state, and which is the usual means of transporting sheep in the locality in question, permits and gives at the same time a special privilege to the railroad companies to transport sheep from the prohibited and alleged infected districts or elsewhere into the state, and such sheep need only be quarantined for fifteen days, and that after they are in the state. (Trans. p. 17. This recognizes a fifteen days quarantine as sufficient to stamp out the disease.

This is clearly a violation of the Fourteenth Amendment to the Constitution of the United States. Its manifest purpose is to hold the good will of the railroad companies, and to prevent their joining in a contest against the state and its favored stockmen.

But whether such is its purpose or not, it is an unwarranted discrimination in favor of the business of the railroad, and the sheepmen who are able or so situated that they can transport their sheep into the state by rail.

The lower court completely overlooked this matter in its decision at least.

If, as alleged and admitted, the quarantine is established for the purpose of securing free grass for Idaho stockmen (Trans. pp. 6, 9, 10) then it is an unconstitutional discrimination.

TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Said law provides that whenever the Governor's proclamation prohibits sheep from entering the state, irrespective of whether they are diseased or not, "it shall be the duty of the State Sheep Inspector, or any of his deputies, to drive or transport sheep coming into the state, in violation of said proclamation, back across the state line from which they came, using all necessary force in so doing; provided, that the said sheep inspector or his deputies may employ such assistance as may be necessary for the enforcement of the provision of this act; and the costs of such deportation shall be a lien upon said sheep; provided, that if the fine and costs in this act provided shall not be immediately paid, the deputy sheep inspector shall retain a sufficient number of said sheep to pay such fine and costs, which sheep shall be sold to pay the same, by the deputy sheep inspector, in the same manner as provided by law for the sale of personal property to satisfy a judgment, and for such services the deputy sheep inspector shall receive and retain such fees as is allowed sheriffs for like services to be taxed as costs." (Trans. p. 19.)

Said act further provides as follows: "Any person failing or refusing to assist said deputy sheep inspector, as in the preceding section provided, shall be punished in a sum not exceeding $1,000.00."

The Appellees threatened the appellants that if they drove their said sheep into the state that they would employ an army of men, if necessary, to drive them back, and retain so many of the sheep as was necessary to pay the expense of so keeping said sheep out of the state. And Appellants allege that if not restrained, the Appellees would so act. (Trans. pp. 6, 8, 11.) No provision was made in this law for determining what the lawful costs were, except that upon a sale of the sheep by the inspectors they should make their charges the same as those allowed sheriffs. No writ or other authority is required to take the sheep, except this law. No provision is made to regulate the charges for driving the sheep out of the state. The inspectors are thereby authorized to take as many men as they conclude is necessary. There is absolutely no limitation on the expense that may be incurred, excepting costs of sale. The inspectors are evidently authorized to enter judgment in their own minds or elsewhere as they please, fix the amount to be charged, and that becomes a judgment lien on the sheep, and if it is not paid (and no time is fixed within which to pay, and no provision is made for notice or demand to be given or made), the inspector sells the sheep the same as he would if he was sheriff and had a lawful writ authorizing the sale.

No opportunity is given to retax the costs or to contest the judgment of the inspectors; in fact, it is not even nec-

essary for the trespassing sheep owner to know what the judgment is, or how it is to be determined. He is denied his day in court. He must promptly pay whatever is demanded. The right of appeal and trial by jury is ignored and totally denied. And the judge may be an avowed enemy and opponent.

An army of citizens of Idaho are to be employed in forcing back the invading sheep (Trans. pp. 8, 11), and they are to be paid out of the proceeds of the sale of the sheep before any judgment is made by any judicial tribunal, known to the law. Even the Constitution and laws of Idaho confine the exercise of judicial functions to certain courts not including sheep inspectors, many of whom can scarcely read the law or anything else. To know a scabby sheep when they see it is their only qualification.

If this is not an attempt to take property without due process of law, what would be?

As alleged in the complaint, the Appellees and their confederates threaten to attempt to carry out the provisions of said law, and will, unless restrained. (Trans. pp. 11, 19.)

The law authorizing the quarantine, seizure and confiscation of sheep as stated above, is in violation of the constitution of Idaho, which limits the exercise of judicial functions to certain courts, neither of which can possibly include the State Inspectors Court or that of any of his deputies.

Sec. 2, Art. V, Constitution of Idaho.

CONFLICTS WITH FEDERAL LAW.

While the states may be permitted to protect their domestic cattle from contagious diseases, they cannot displace or duplicate the regulations provided by Federal legislation. Congress, in so far as it acts in matters of fecting inter-state commerce, is supreme. Congress having acted and Federal officers, in pursuance of an act of Congress, having inspected the sheep in question and the range from which they came, and having found the same free from disease, and certified to the fitness of the sheep for inter-state commerce, (Trans. pp. 8, 9), by what authority or process can a state inspector at the same time and place find the same sheep diseased and not fit for inter-state commerce, and prohibit such sheep from crossing state lines, on the ground that they are diseased or the range from which they came is diseased, and this, too, in the face of the fact that it is conceded that the sheep and range in question are free from disease.

That Congressional action does supercede state quarantine regulations and is supreme.

See Missouri K. & T. R. Co. vs. Haber, 169 U. S. 613, and cases therein cited.

State vs. Duckworth (Idaho) 51 Pac. Rep. 456.

Gibbons vs. Ogden 9 Wheat. at page 210.

Henderson vs. Mayor 92 U. S. 272.

Campagnie Francaise vs. State Board, 46 U. S. L. Ed. 815.

Congress has provided inspection and quarantine regulations for inter-state transfer of live stock, including sheep.

Sections 6, 7, 8, 9, of the Act of Congress of May 29th, 1884 (23 Stat. at L. 31, Chap. 60.)

Sections 1, 2, 3, 5, of the Act of March 3rd, 1891, (26 Stat. at L. 1044, 1049 Chap. 544, Entitled an Act to provide for the Inspection of live stock, etc., when the subject of inter-state commerce.

An Act making apropriations for the Department of Agriculture of March 2, 1895.

Act of Feb. 9, 1889. (25 Stat. at L. 659, Chap. 122.)

Act of March 2, 1889. (25 Stat. at L. 835, 840, Chap. 373.)

Act making Apropriations for the Agricultural department of July 18, 1888, (25 Stat. at L. 228, Chap. 677.)

Rules and Regulations for the Suppression and Extirpation of Contagious, Infectious and Communicable Diseases Among the Domestic Animals of the United States. Issued by the Commissioner of Agriculture, April 14, 1887, page 32, Bulletin No. 9, U. S. Department of Agriculture of the Bureau of Animal Industry.

Order of the Secretary of Agriculture dated December 13, 1895, entitled "Regulations Prohibiting the Transportation of Animals Afflicted with Hog Cholera, Tuberculosis, or Sheep Scab."

Order Secretary of Agriculture dated June 18, 1897, entitled "Transportation of Sheep Affected with Scabbies."

Order of the Acting Secretary of Agriculture, dated

July 20, 1899, entitled "Regulations Concerning the Dipping of Sheep Affected with Scabbies."

It is true that the Haber case just cited upheld a State statute providing that a railroad company was liable for all damages caused by bringing diseased cattle in contact with other cattle, even though in so transporting such diseased cattle the regulations of the Federal Government were complied with.

But in the Haber case the court said, in discussing the Husen case, that the Kansas statute was not subject to the objections to the Missouri statute for the reason that it did not exclude Texas cattle; it merely made those who brought cattle into the State from Texas, liable for the damage caused by the disease which such cattle imparted to others. This liability was based on the theory that while it might not be known that such cattle were diseased when transported, it was known as stated in the Idaho case. (State vs. Duckworth 51 Pac. Rep. 456 at 458) "that Texas cattle are the natural habitat for said disease."

The Supreme Court of Idaho, in said Duckworth case, went farther and said, citing the decision in Welton vs. Missouri, 91 U. S. 275, (which held the law to be the same) that "it has been held that the non-exercise by Congress of its power to regulate commerce among the States is equivalent to a declaration by that body that such commerce shall be free from any restriction."

In conclusion, we insist that the law in question is unconstitutional on its face, because it provides for taking property without due process of law.

That the Proclamation is unconstitutional because it discriminates against and deprives citizens of the State of Utah the privilege of grazing their sheep on the public domain of the Federal Government in the State of Idaho for the purpose of giving that privilege exclusively to citizens of the State of Idaho. It is also unconstitutional for the reason that it discriminates against and deprives citizens of the United States of the equal protection of the law. It is also unconstitutional because it gives the privilege of transporting sheep by rail into the State of Idaho, and denies to those unable to use the railroad, the privilege of transporting sheep into Idaho.

That both the Law and Proclamation and the actions of said Appellees are unconstitutional, for the reason that they violate the inter-state commerce provisions of the Constitution of the United States.

That the actions of the Appellees are unconstitutional for all of the reasons above stated.

The Appellants, believing in the justice of their cause, demand the reversal of the decision of the trial court.

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